



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

May 19, 1998

Mr. Kevin McCalla  
Director, Legal Division  
Texas Natural Resource  
Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR98-1242

Dear Mr. McCalla:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 115516.

The Texas Natural Resource Conservation Commission (the "commission") received an open records request for records pertaining to Continental Coffee. Specifically, the requestor seeks:

waste disposal permits, RCRA generator notification forms, compliance with air/water regulations, and any records concerning the installation or removal of any underground storage tanks that may have occurred on the property.

You state that the commission has released some of the requested information. You contend, however, that four documents are excepted from required public disclosure pursuant to section 552.101 of the Government Code, in conjunction with section 382.041 of the Health and Safety Code, and section 552.110 of the Government Code as "trade secrets."<sup>1</sup>

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, *statutory*, or by judicial decision." (Emphasis added.) Section 382.041(a) of the Health and Safety Code provides:

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<sup>1</sup>Section 552.110 of the Government Code excepts from public disclosure "trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision."

Except as provided by Subsection (b), a member, employee, or agent of the commission may not disclose information submitted to the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.

In Open Records Decision No. 652 (1997), this office determined that the definition of a trade secret contained in the Restatement of Torts and adopted by the Texas Supreme Court for use in common law trade secret actions is the appropriate standard to use when determining if information is "relating to the secret processes or methods of manufacture or production" under section 382.041 of the Health and Safety Code. Accordingly, information is protected under section 382.041 if 1) it is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and 2) the information was identified as confidential by the submitting party when it was submitted to the commission. Because this office also looks to the Restatement of Torts definition of "trade secrets" when making determinations under section 552.110 of the Government Code, we will consider the applicability of these two provisions together.

There are six factors to be assessed in determining whether information qualifies as a trade secret.<sup>2</sup> This office must accept a claim that information is excepted as a trade secret if a prima facie case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. However, where no evidence of the factors necessary to establish a trade secret claim is made we cannot conclude that section 552.110 applies. Open Records Decision No. 402 (1983). In this instance, although you have made assertions that two of the six factors to be considered for trade secret protection may apply, you have not established a prima facie case that the information at issue constitutes trade secrets.

We note, however, that you have also requested an open records decision from this office regarding this matter pursuant to section 552.305 of the Government Code.

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<sup>2</sup>These six factors are

- 1) the extent to which the information is known outside of [the company's] business;
- 2) the extent to which it is known by employees and others involved in [the company's] business;
- 3) the extent of measures taken by [the company] to guard the secrecy of the information;
- 4) the value of the information to [the company] and to [its] competitors;
- 5) the amount of effort or money expended by [the company] in developing this information;
- and 6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

In accordance with the practice this office established in Open Records Decision No. 575 (1990), we notified representatives of Continental Coffee that we received your request for an open records decision regarding this information. In our notification, this office requested an explanation as to why the information at issue was excepted from public disclosure, with the caveat that unless we received such explanation within a reasonable time this office would instruct the commission to disclose the information.

More than fourteen days have elapsed since this office issued its notice, but Continental Coffee has failed to provide this office with any explanation as to why the requested documents should not be released. Consequently, we have no basis for concluding that the information at issue constitutes trade secret information. *See* Open Records Decision No. 552 (1990). Because neither you nor Continental Coffee have demonstrated to this office that the information should be withheld, the commission must release the information at this time.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/RWP/rho

Ref.: ID# 115516

Enclosures: Submitted documents

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cc: Mr. James Zaebst  
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